The Central Law Journal.

ST. LOUIS, AUGUST 26, 1881.

CURRENT TOPICS.

The wave of prohibitory liquor legislation, which is sweeping over the country, took in Tennessee the form of a statute passed last winter, requiring from "wholesale liquor dealers" the payment of a new and additional license or privilege tax to the State, of $150 per annum. Shelby County, in which Memphis is situated, supplemented this legislation by requiring payment of $50 also from the same class annually. A firm of grocers in Memphis, who had paid their taxes and taken out their license as such, contested the validity of the act of 1881, on the ground that the additional tax was double and excessive taxation. The circuit court at Memphis having sustained the validity of both State and County taxes, its decision was in June last affirmed by the Supreme Court. It was held that each several class of merchants might be separately taxed; that the legislature might by new legislation, as they have done, place those who sold liquor by wholesale in a new class, and impose on them a special tax; that a grocery merchant, who keeps liquors as a part of his stock, would fall in the category of "wholesale liquor dealers," and must pay taxes accordingly: that a merchant's license is not a contract, and that the rate of license tax may be changed during the period of the license; and that the business of wholesale liquor dealers "might be prohibited altogether, or subjected to such burdens upon the exercise of the privilege as the legislature may deem advisable." The case will be reported under the name of Kelly v. Dwyer. It seems to be in accord with the general current of authority in Ohio, Michigan, Tennessee and other States, and also in the United States Courts, in sustaining the power of the legislature to regulate, without limit, the liquor traffic, in the same manner that lotteries, games, nuisances, and all speculations and adventures that are not considered matters of common right, have been regulated and controlled from time immemorial.

At the annual meeting of the American Bar Association, at Saratoga last week, the subject of legal education received some consideration. A resolution was adopted that the association recommend and further in all law schools, a thorough course of instruction, an adequate number of professors, and a three years' course of study; and that diplomas granted by such schools ought to entitle the recipient to admission to practice as an attorner-at-law.

Of course there is, and will always be, much difference of opinion among the gentlemen of the profession as to just what is the proper period for the apprenticeship of the law-student to continue. Some think that the regulations governing admission to the bar should be made more stringent, while others believe that no such regulations would have the effect to shut out incompetent men, and that the best plan is to leave it to the public to discover and punish such incompetency by neglect. We think, however, that we may safely say that the feeling of the bar is largely in favor of the former view, and that the action of the association will meet their approval generally.

The matter of the best method of relieving the over-crowded dockets of the Supreme Courts of some of the States, and of the United States also, received some consideration, and was referred to a committee, with permission to print the result of its labors at its discretion. This report will be looked for with great interest, for the matter is one of the gravest importance to the profession as well as to litigants.

The report of the committee on Judicial Administration and Reform, in relation to a general bankrupt law, was called up as the special order, and was laid over until next year. This would seem to indicate that the passage of such a measure was not regarded as so likely a contingency, as one would naturally think, from the very general discussion of the subject for some time past in the public prints.

THE SURVIVING PARTNER.

I.

The death of a partner operates the dissolution of the partnership.[1] This rule is absolute and universal. The dissolution is instantaneous, and it is in no degree incumbent upon the surviving partners to give notice of a dissolution consequent upon death, as when the connection terminates by consent or limitation.[2] It is frequently said that a partnership may be continued after the death of a partner, if a provision to that effect has been made in the original articles of agreement or in the will of the deceased. This is inaccurate and fallacious. Such a provision may be made for a new partnership, to go into effect upon the death of a partner, but the old partnership can not be continued. Neither logically, nor legally, is the association after the death of a partner the same partnership that existed before that event.[3] There is not, of course, the same *personnel*, nor always the same kind or amount of assets available for the uses of the firm, or liable to the demand of its creditors; the heir or appointee may refuse to accept the character of partner, and thus defeat the proposed continuation; and the rights of subsequent creditors generally vary materially from those of the antecedent creditors. In *ex parte* Richardsor,[4] where a testator, by his will, directed that the trade in which he was engaged should be carried on after his death in the same firm, it was held that the capital, at that time employed in the business, was all of his estate that was liable to subsequent creditors.

Assuming that upon the death of a partner the partnership is dissolved, the rights, duties, and liabilities of the partner who survives undergo a very material change. Before dissolution the relation between the partnership and the individual partners was that of principal and agent.[5] The legal and commercial entity known as "The firm" was the principal, and each of the several partners was its agent—not the agent of the different persons comprising the copartnership, but of the whole body taken together.[6] The powers possessed by each partner were very extensive and indefinite, and the objects for which they were exerted were the success and aggrandizement of the partnership. After dissolution, by the death of a partner, these powers and this character of agent are instantly extinguished;[7] but as immediately is the survivor invested with another and a different character, he becomes a trustee for all concerned.[8] The scope of his exertions is narrowed to the settlement of the partnership business, the collection of its assets, the payment of its debts, and the distribution of the net surplus among the parties entitled to it.[9] In order, however, to effect these objects, he is endowed with very extensive powers. He holds the legal title to all the personal property, *choses in action* and other assets of the firm;[10] he is authorized to control the real estate of the partnership, and, when necessary, to require the person holding the legal title to the partnership land, to convey to his purchaser, if he shall deem it expedient to make a sale

[1] Crayshaw v. Maule, 1 Swanst. 251; Canfield v. Hard, 6 Conn. 184; Crawford v. Hamilton, 3 Madd. 251; Washburn v. Goodman, 17 Pick. 519; Dyer v. Clark, 5 Metcf. 575: Savage v. Putnam, 32 Barb. 425; Bank of Mobile v. Andrews, 2 Sneed, 535; Knowlton v. Reed, 38 Me. 246; Laughlin v. Lorenz, 48 Penn. 275; Griswold v. Waddington, 15 Johns. 82; Scholefield v. Eichelberger, 7 Pet. 586; Humphries v. McCraw, 5 Ark. 65.
32 Barb. (S. C.) 425.

[2] Marlatt v. Jackman, 3 Alen, 287; Vulliancy v. Noble, 3 Meriv. 593.

[3] Kershaw v. Matthews, 2 Russ. 62.

[4] 3 Madd. 79. See also Jacquin v. Buisson, 11 How. Pr. 385; *Re* Clap, 2 Lowel, 168.

[5] Marlatt v. Jackman, 3 Allen, 290; Wheatcroft v. Hickman, (Cox v. Hickman,) 7 Jurist, 105; S. C., 8 H. L. Cases, 268; Bullen v. Sharp, 12 Jurist, 247.

[6] Marlatt v. Jackman, 3 Allen, 290.

[7] Marlatt v. Jackman, *supra*; Humphries v. McCraw, 5 Ark. 65.

[8] Case v. Abeel, 1 Paige, 393; Washburn v. Goodman, 17 Pick. 519; Ames v. Downing, 1 Bradford, 321. Phillips v. Atkinson, 2 Bro. Ch. 272; Burden v. Burden, 1 Ves. & B. 170; Estwick v. Conningsby, 1 Vern. 118; Hartz v. Schrader, 8 Ves. 317. Nelson v. Hayner, 66 Ill. 487.

[9] Evans v. Evans, 9 Paige, Ch. 180; Peters v. Davis, 7 Mass. 256; Oakman v. Dorchester, etc. Co., 98 Mass. 58; Dwinel v. Stone, 30 Me. 386; Clark v. Howe, 23 Me. 561; Calvert v. Marlow, 18 Ala. 73; Kinsley v. McCauts, 4 Rich. L. 46; Shields v. Fuller, 4 Wis. 104; Alexander v. Coulter, 2 Serg. & R. 494; Berry v. Harris, 22 Md. 31: Stearn v. Houghton, 38 Vt. 586; Roys v. Vilas, 18 Wis. 170; The People v. White, 11 Ill. 350; Jones v. Hardesty, 10 Gill & J. 404; Allen v. Hill, 16 Cal. 117; Barry v. Briggs, 22 Mich. 201; Offutt v. Scott, 47 Ala. 104; Betts v. June, 51 N. Y. 274; Heath v. Waters, 40 Mich. 457; Egbert v. Wood, 3 Paige, Ch. 517; Smith v. Walker, 38 Cal. 386; Gleason v. White, 34 Cal. 258; Matthison v. Field, 3 Rob. (La.) 47; Murray v. Mumford, 6 Cowen, 441.

[10] People v. White, 11 Ill. 350; Crayshaw v. Collins, 15 Ves. 226; Jones v. Hardesty, 10 Gill & J. 404; Allen v. Hill, 16 Cal. 117; Offutt v. Scott, 47 Ala. 104; Adams v. Ward, 26 Ark. 135; Smith v. Walker, 38 Cal. 306.

for the purpose of paying the debts of the firm.[11] Indeed, it has been held that he can sell and convey the real estate of the firm, without any reference whatever to the debts of the firm, and in such case the purchaser gets a good title.[12] Under the direction of a court of equity he can sell partnership lands at public or private sale at his discretion.[13] All suits upon *choses in action* or other lawful claims of the firm must be brought by the surviving partner, or in his name and with his consent;[14] he is in no respect responsible or subordinate to the personal representative of the deceased partner,[15] and can not be denuded of his trust, except by a court of equity, upon proof that he has abused it, or has been otherwise guilty of fraudulent conduct.[16] As long as he continues financially responsible, and acts in good faith, he will be permitted to control the partnership property and wind up the affairs of the firm, although he may reside beyond the jurisdiction of the court, even in a foreign country, provided his business is transacted through a competent agent, and with reasonable diligence.[17] A receiver, however, will be appointed if the surviving partner acts fraudulently or improperly, or delays unduly the settlement of the partnership business.[18]

A surviving partner may compel the administrator of the deceased partner to deliver or pay to him all the partnership assets and *choses in action*, which had come to such administrator from his intestate;[19] and where an attorney had, at the instance of the deceased partner in his life-time, collected money for the firm, and afterwards paid it to the administrator of the deceased partner, the attorney was held responsible to the surviving partner for the amount.[20] And where the deceased partner had agreed to apply to the payment of his individual debt certain notes belonging to the firm, but had not consummated the contract, it was held that the surviving partner was in no respect bound by the agreement, but could compel the administrator of the deceased partner to deliver up the notes.[21] His control of all the partnership assets, real and personal, legal and equitable, is absolute and indefeasible, limited only by the purposes for which it is granted to him, the settlement of the partnership business. He has the exclusive right to collect the *choses in action* of the firm; and payment by a debtor to the executor of the deceased partner does not exonerate the debtor from the demands of the surviving partner.[22] If he is the creditor of the firm, and indebted to another person, he may transfer to his creditor the debt due to him by the firm, who will, in his stead, become liable to his creditor; and this may be done, although the affairs of the partnership have not been settled.[23] This, however, relates to a specific and definite demand; his claims stand upon the same footing as the claims of other creditors. His right to contribution from the estate of his deceased partner does not accrue, until he has exhausted the assets of the firm in the payment of its debts. The administration of the partnership business is an open account, and consequently between him and the estate of the deceased, the statute of limitations and of non-claim begins to run only from the last item of the account.[24] Until a balance is struck upon the settlement of the partnership accounts, the relation of debtor and creditor between the surviving partner and the estate of the deceased does not arise, and no statute of limitation begins to run until the claim becomes absolute by such settlement.[25]

In some respects the surviving partner resembles an administrator; he possesses powers, however, which the law does not

11 Dyer v. Clark, 5 Metc. 562; Cobble v. Tomlinson, 50 Ind. 550; Whitney v. Cotten, 53 Miss. 689.

12 Solomon v. Fitzgerald, 7 Heisk. (Tenn.) 552.

13 Mauck v. Mauck, 54 Ill. 231.

14 Roys v. Vilas, 18 Wis. 170; Davis v. Church, 1 Watts & S. 240; Pfeffer v. Steiner, 27 Mich. 537.

15 Roys v. Vilas, *supra*; Cannon v. Copeland, 43 Ala. 201; Egbert v. Wood, 3 Paige Ch. 517; Florida v. Redding, 1 Fla. 242; Miller v. Jones, 39 Ill. 54.

16 People v. White, 11 Ill. 350; Nelson v. Hayner, 66 Ill. 487. See also Hartz v. Schrader, 8 Ves. 317; Jacquin v. Buisson, 11 How. Pr. 385.

17 Evans v Evans, 9 Paige Ch. 178.

18 Butchart v. Dresser, 4 De Gex, M. & G. 542; Miller v. Jones, 39 Ill. 54; Estwick v. Conningsby, 1 Vern. 117.

19 Calvert v. Marlow, 18 Ala. 73; Shields v. Fuller, 4 Wis. 102; Stearns v. Houghton, 38 Vt. 584; Murray v. Mumford, 6 Cowen, 441.

20 Kinsler v. McCauts, 4 Rich. L. 46.

21 Stearns v. Houghton, 38 Vt. 584.

22 Wallace v. Fitzsimmons, 1 Dall. 248.

23 Peyton v. Stratton, 7 Gratt. 380; Brown v. Higginbotham, 5 Leigh, 583.

24 Cannon v. Copeland, 43 Ala. 201.

25 Gleason v. White, 34 Cal. 258.

vouchsafe to the ordinary representative of the deceased. In settling the affairs of the firm, he can, unlike the administrator, prefer creditors to the same extent that he could, if the debts and funds were his own. He can transfer to favored creditors *choses in action* and other partnership assets, and assign promissory notes and other negotiable paper, and his indorsement will pass the title, but can not attach to the estate of the deceased any contingent liability.[26] After the debts of the firm have been paid, he can, in settling with the estate of his deceased partner, transfer to him *choses in action* or other partnership assets, and the title will pass by his assignment.[27]

When, however, a firm is insolvent and is dissolved by death, the surviving partner can not, by an assignment of all the assets of the firm, transfer to a trustee the settlement of the business, and give preference to certain joint creditors.[28] This preference, it seems, might have been given in New York by a general trust deed executed by the surviving partner, previous to the passage of the Revised Statutes of that State. By those statutes, however, such preference is forbidden.[29]

Like other trustees, the surviving partner is forbidden to make a personal profit out of the property which he holds in trust. He has no right to appropriate the assets of the firm to his own use at his own price, or to take them at valuation; nor can he require the other parties in interest, to remove their proportion of the property and leave him in possession.

The proper mode of winding up a partnership is to have a general sale and, after payment of the debts, a division of the proceeds.[30] Indeed, in the case of Cook v. Collinridge,[31] it was held that, although the articles of partnership provided that, upon its expiration, the stock in trade should be divided among the partners, according to their respective interests, the court would not permit the executor of a deceased partner thus to dispose of his testator's interest, receiving it upon valuation, and then selling it to one of the surviving partners. It was held that the agreement could not be carried into literal effect, and therefore it was required that the settlement should take place under the general law of partnership, by a sale and division of the whole property. In Leach v. Leach,[32] however, where the stipulations for a division of the assets were practicable, and could be executed without injustice, they were ordered to be carried into effect. In Wilson v. Greenwood,[33] it was stipulated that in the event of bankruptcy, the partnership should be dissolved, and the solvent partners should take the bankrupt's share upon valuation; the court held that the assignee was not bound by the agreement, but intimates that the result would be different in case of a dissolution by death, because the bankrupt could not name a valuer after his bankruptcy; but an executor could, after the death of the partner.

A surviving partner can not mortgage the partnership assets, including, of course, the share of the deceased partner, to secure a debt due chiefly by himself, and only in part by the deceased, with a view to the continuance of the trade.[34] As already intimated, he has no right to use the assets of the firm in continuing the trade, unless authorized by the original articles of partnership, or the will of the deceased. If it is continued merely to wind up the concern, it is not properly a partnership, but a trust.[35] If it shall be carried on as a continued trade, it is at the risk of the surviving partner, and at the option of the representatives of the deceased, who have a right to elect between interest on their capital or a share of the profits. The accounts upon settlement are to be stated as of the day of the death of the deceased partner.[36] The rule, however, goes upon the supposition that the deceased had capital in the concern that

[26] French v. Lovejoy, 12 N. H. 460; Egbert v. Wood, 3 Paige, 517; Bredow v. Mutual Sav. Ins. Co., 28 Mo. 186; Johnson v. Berlezheimer, 84 Ill. 54; Pinkney v. Wallace, 1 Abb. Pr. 82; McClelland v. Remsen, 23 How. Pr. 175; Scott v. Tupper, 8 S. & M. 280.

[27] Roys v. Vilas, 18 Wis. 169.

[28] Barcroft v. Snodgrass, 1 Coldw. 430.

[29] Hutchinson v. Smith, 7 Paige Ch. 26.

[30] Featherstonhaugh v. Fenwick, 17 Ves. 310; Crayshaw v. Collins, 15 Ves. 218; Sigourney v. Munn, 7 Conn. 11; Evans v. Evans, 9 Paige, 178; Dougherty v. Van Nostrand, 1 Hoff. Ch. 68; Ogden v. Astor, 4 Sandf. Sup. C. 313; Case v. Abeel, 1 Paige, 393; Booth v. Parks, 1 Malloy, 465.

[31] Jacob, 607; see, also, Simmons v. Leonard, 3 re, 581; Nelson v. Hayner, 66 Ill. 487.

[32] 18 Pick. 68, 75.

[33] 1 Swanst. 471.

[34] Buckley v. Barber, 1 Eng. L. & E. 506.

[35] Booth v. Parks, 12 Cond. Eng. Ch. 228; S. C. 1 Malloy, 465.

[36] Millard v. Ramsdell, Harr. Ch. 373. See Crayshaw v. Collins, 15 Ves. 228; Ames v. Downing, 1 Brad. 321; Washburn v. Goodman, 17 Pick. 519.

might be endangered by the continuance of the trade. If that is not the case, the principle does not apply.[37] And where a partnership is thus continued, the share of the deceased in the profits is not measured by the mere arithmetical value of his share of the capital, but its amount may be controlled by the source of the profit, the nature of the business, and other circumstances.[38] When the continuance of the partnership is not a breach of trust by the surviving partner, but has received the assent of the representatives of the deceased, it seems that he will be allowed compensation for his personal services, which is not usually allowed for the mere regular closing up of the affairs of the partnership.[39] Under any circumstances, the surviving partner is liable for any profits that he has made with the firm capital in another business;[40] but where the heirs of the deceased have assented for a number of years to his continuance of the business, they are bound by his acts, and can not hold him liable for profits that he might have made, but lost by negligence and mismanagement.[41]

The surviving partner is often the executor of the deceased. When that is the case, and he has traded on the stock of the firm, he is chargeable with the prices actually realized or the fair market value.[42] Under all circumstances he is a trustee, and his trust is, unless varied by agreement or the will of the deceased, to close the business as soon as possible. If he takes no steps in that direction, but embarks in new enterprises with the firm capital, it is a conversion, and he is responsible to the estate of the deceased for the full value of the latter's share of the assets at the time of the conversion.[43]

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37 Hyde v. Easter, 4 Md. Ch. 84.
38 Willett v. Blandford, 1 Hare, 254; S. C. 23 Eng. Ch. 254.
39 Brown v. De Tastet, 4 Cond. Eng. Ch. 133. See, also, Crayshaw v. Collins, 15 Ves. 218.
40 Waring v. Cram, 1 Pars. Sel. Eq. Cas. 516.
41 Reynaud v. Peylevin, 13 La. 121.
42 Ames v. Downing, 1 Bradf. 321.
43 Forester v. Oliver, 1 Ill. App. 259.

LIABILITY INTER SE OF OCCUPIERS OF DIFFERENT PARTS OF THE SAME HOUSE.

The case of Stevens v. Woodward,[1] is a case of some interest, as illustrating the nicety of the distinctions upon which the existence or absence of legal liablity sometimes turns.

The facts of the case were simple. The plaintiffs occupied premises beneath the offices of the defendants, who were solicitors. One of the defendants had a room in the offices, and it was a lavatory for his own use, his orders to his clerks being that none of them should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left, turned the water tap and negligently left it turned, so that the water overflowed and flowed into the plaintiffs' premises and damaged them. It was held that the act of the clerk was not within the scope of his authority or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable.

We do not see how the decision could have been otherwise. The case was put as one of liability of master for the act of his servant, and the usual discussion took place with regard to the scope of the employment, and so forth. The court decided, and we can not help thinking rightly decided, that it was not within the scope of a clerk's employment to go into a room from entering which he was forbidden, and to use a lavatory not intended for his use. You might just as well say that if a solicitor, having returned from an autumn trip to the moors, should happen to leave a gun in his chambers with cartridges, and a meddlesome clerk should get playing with it, and trying how it was loaded, the solicitor would be liable if the gun went off and shot somebody on the floor below. It does not seem to us that the case can be determined on different considerations than would arise, if some mischievous errand boy, not in the defendant's employ, but having been sent to the premises on an errand, had turned on the tap of the lavatory while the clerk's back was turned, and so the mischief had been occasioned. As was pointed out by the court,

1 29 W. R. 506; L. R. 6 Q. B. D. 318.

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the cases about scope of employment run extremely fine. To our thinking, in some cases, the scope of employment has been carried very far as against the master. But whatever the true definition of the scope of the employment may be for the purpose of determining the liabiliity of the master, the act of the clerk in this case was clearly on the other side of the line, and was not an act done in the scope of the employment.

The case was put in argument entirely on the question of negligence, and the liability of the master for the acts of the servant; but it is obvious that cases of this sort involve other considerations. These considerations, however, have been discussed in two previous cases, though we confess the law as between occupiers of different parts of the same house seems to us, notwithstanding these cases, to require further elucidation. In the case of Carstairs v. Fedden,[2] the plaintiffs hired of the defendant the ground-floor of a warehouse, the upper part of which was occupied by the defendant himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the plaintiff's goods. The defendant had used reasonable care in examining and seeing to the security of the gutters and the box. It was held that the defendant was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. An attempt was made to apply the well-known doctrine of Fletcher v. Rylands[3] to this case. That doctrine is, that when one land-owner alters the natural state of things by collecting on his land some agent, such as water, which, if it escapes, must trespass on and damage the land of another, he is bound, at his peril, to keep it in, unless prevented by the act of God or *vis major;* it is not a question of negligence or no negligence. But Kelly, C. B., held that the accident occasioned by the rat was analogous to *vis major* or the act of God; and Bramwell, B., thought that the case differed from Fletcher v. Rylands, because in that case the defendant collected the water solely for his own benefit; but, in the case before him, the collecting of the water was as much for the benefit of the occupier of one part of the house as for the occupier of another. It seems pretty clear that this was a substantial distinction, and so the decision left untouched the question how far the doctrine of Fletcher v. Rylands might be applicable between the occupiers of different parts of the same house.

The case of Ross v. Fedden[4] raised points of a somewhat similar description. The plaintiff there occupied for business purposes the ground-floor, and the defendants the second-floor, of the same house, respectively, as tenants from year to year. There was a water-closet on the defendants' premises, to which they alone had access, and of which they alone had the use. After their respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first-floor to the plaintiff's premises, and caused damage to his stock-in-trade. The overflow of water was owing to the valve of the supply-pipe to the pan of the water-closet having got out of order, and failed to close, and the waste-pipe being choked with paper. These defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence. It was held that the doctrine of Fletcher v. Rylands did not apply, and that the defendants were not liable. The case was an appeal from the decision of a deputy county court judge. We believe the deputy county court judge was Mr. Wilson, the present Indian judge. He said, in giving judgment, "I think, however, that the judgment in Carstairs v. Taylor[5] leaves it very doubtful whether the rule of law, laid down in Rylands v. Fletcher,[6] applies to the case of two persons occupying two floors of the same house. But assuming the rule to apply, is the present case within it? As between the occupiers of parts of a house—a thing wholly artificial—it is rather a straining of language to speak of any one state of things as more natural than another. But I think that, in the words of Martin, B., in the case already referred to, 'one who takes a floor of a house must be held to take the prem-

[2] L. R. 6 Ex. 217.
[3] L. R. 3 H. L. 340.
[4] L. R. 7 Q. B. 661.
[5] L. R. 6 Ex. 217.
[6] L. R. 2 H. L. 330.

ises as they are.' As far as he is concerned, I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water. I think he takes subject to the ordinary risks arising from the use of the house as it stands; and that one who merely continues to use the rest of the house as it stands, and in the ordinary manner, does not fall within the rule in Rylands v. Fletcher, and in the absence of negligence is not liable to the consequences; and in the present case there is nothing to show, nor has it been suggested, that the water-closet or anything connected with it has been in any way altered by the defendants since they came into occupation. There is nothing to show, nor has it been suggested, that it has been in any way altered since the plaintiff became tenant of the ground-floor, or that it has been used in any but the ordinary manner." The judgments of the judges affirming this decision were short, and do little more than express concurrence with the reasoning of the deputy county court judge. The terms of his judgment leave open various nice questions which might arise as to the liability of the occupier of one part of a house to the occupier of another part of the same house. He expressly guards himself from expressing any opinion whether the doctrine of Fletcher v. Rylands would apply when the occupier of one part of the house has altered the state of things, existing at the time when the occupier of the other part of the house became tenant, by bringing a dangerous agent, such as a collection of water, upon the premises.

It seems to us that great difficulty may in future arise with regard to the determination of a question of that sort; but possibly it may turn out that no alteration of the existing state of things, which does not go beyond the ordinary and reasonable use of the kind of premises which may be in question, would cause the doctrine of Fletcher v. Rylands to apply.—*Solicitors' Journal.*

PUBLIC OFFICERS — MUNICIPAL CORPORATION—MANDAMUS—ABATEMENT.

THOMPSON v. UNITED STATES.

Supreme Court of the United States, October Term, 1880.

1. A resignation by a public officer is of no effect to relieve him of the duties and responsibilities of the office until it is accepted.

2. A *mandamus*, directed to a clerk of a board of township supervisors, does not abate merely by the expiration of the office of the defendant where there is a continuing duty irrespective of the incumbent.

In error to the Circuit Court of the Unite States for the Western District of Michigan.

Mr. Justice BRADLEY delivered the opinion of the Court:

This case arises upon a petition for a *mandamus* to compel Thompson, the township clerk of the township of Lincoln, in the county of Berrien, State of Michigan, to make and deliver to the supervisor of the township, a certified copy of a judgment recovered against it by the Cambria Iron Company, the petitioners, in order to its being placed upon the tax-roll for collection and payment. The questions arising are much the same as those disposed of in the case of Edwards v. United States [12 Cent. L. J. 188], just decided. The petition states that the Cambria Iron Company recovered judgment against the township of Lincoln, in the circuit court of the United States, on the 29th of May, 1876, for the sum of $6,273.-32, besides costs, and caused to be delivered a certified copy thereof to Thompson, the township clerk, with a request to certify it to the supervisor, to be raised by tax on the township; but that Thompson declared that he would not do it, and pretended that there was no supervisor; that one Mitchell Spillman, who had been supervisor, had resigned; and that if there were any supervisor, still he would not do it; that he himself had resigned, and was not clerk of the township; that the supervisor and himself had both resigned for the express purpose of defeating the collection of petitioner's judgment, and other similar claims. The petition charges that the said supervisor and clerk have fraudulently combined to cheat and defraud the petitioners by falsely pretending to resign, whereas they actually continued to discharge the duties of their office—setting forth various facts corroborative of the charge.

The court below having granted a rule to show cause why a *mandamus*, as prayed for, should not issue, the defendant filed an answer to the petition, admitting that a judgment had been entered against the township, as stated in the petition, but averring that it was not a valid judgment, because, as the answer alleged, the court never obtained jurisdiction; that no service was ever had of process in the cause upon the supervisor of the township; that Alonzo D. Brown, upon whom

service was made, was not at the time supervisor; and that, although one Clapp, an attorney, appeared for the township, he was never employed by the township; that the defendant was, it is true, duly elected clerk of the township in April, 1876, but that he resigned his office before the certified copy of the judgment was served upon him, by filing in the office of clerk [that is, his own office] and depositing with the files of the township a written resignation addressed to the township board; and that he has not acted as clerk since. He admits that he refused to certify the judgment, but did so because he was not clerk, and because there was no supervisor, Spillman, who had been supervisor, having resigned. This answer was demurred to, but the demurrer was overruled, and the cause came on for trial. The jury rendered a special verdict, as follows: "First. That on the 23d day of November, 1875, Alonzo Brown, upon whom the declaration was served in the original case of The Cambria Iron Company v. The Township of Lincoln, was supervisor at the time the declaration in said cause was served upon him as such supervisor by the marshal. Second. That George S. Clapp, who entered his appearance as attorney for the defendant in said cause, and appeared and plead therein for said township of Lincoln, was duly authorized by said defendant to appear and plead for it in said cause. Third. That the respondent, John F. B. Thompson, was, at the time of the service of the order to show cause in this why a *msndamus* should not issue against him, clerk of the said township of Lincoln, and has not resigned the said office. Fourth. That Mitchell Spillman was, at the time the said order to show cause was served, the supervisor of said township, and still holds the office on October 1st, A. D. 1876."

The questions raised on the trial were, as in the previous case of Edwards, whether the tender of a resignation by a supervisor or clerk of a township, by filing the same with the clerk, was valid and effectual as a resignation, so as to discharge the officer of his official character, without an acceptance by the township board, or an appointment to fill the vacancy. Such a resignation was relied on to show that Brown, on whom process in the original action was served, was not supervisor, and that Spillman was not supervisor, and the defendant was not clerk when the present proceedings were commenced. As we have fully discussed this question in the previous case, it is not necessary to say anything further on the subject. The ruling of the court below was in conformity with our decision in that case. This also disposes of the question of the appearance of Clapp, the attorney in the original action, he having been employed by Brown, the supervisor. Another question raised at the trial was, whether the petitioner might show the motive and intent with which the supervisor and clerk attempted to resign, with a view to show that it was done for the purpose of defrauding the petitioners, and avoiding to do those acts which were necessary to the collection of his judgment. The court allowed evidence to be given on the subject, and to this the defendant excepted. We do not see why the evidence was not admissible for the purpose of showing that the attempted resignation was simulated and fraudulent. But it is not necessary to decide this point, since the admission of the testimony did not injure the defendant, because the attempted resignations were not completed by the acceptance of the township committee. Another point raised was that it appeared by the township book, offered in evidence, that the township board did appoint a successor to the defendant as township clerk, on the 4th day of November, 1876, after the cause was at issue. On motion of the petitioner's counsel, this evidence was stricken out, for the reason that such fact having arisen since the return was made, it was not competent under the issue framed thereon. It does not appear that this matter was in any way brought to the notice of the court, or sought to be put in issue, until the evidence was offered during the trial. In addition to this, the evidence was not conclusive. It did not show that the attempted appointment was effectual. Had the point been properly put at issue, the whole matter could have been known. We think the court was justified in striking out the evidence. As a matter of defense, whether in abatement or in bar, it should have been set up by a plea *puis darrein continuance*, or its equivalent. It could not be given in evidence under any of the issues in the cause. Jackson v. Rich, 7 Johns. 194; Jackson v. McCall, 3 Cow. 79.

But we can not accede to the proposition that proceedings in *mandamus* abate by expiration of office of the defendant where, as in this case, there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached. The contrary has been held by very high authority. People v. Champion, 16 Johns. 61; People v. Collins, 19 Wend. 56; High on Extr. Rem., § 38. We have had before us many cases in which the writ has, without objection, been directed to the corporation itself, instead of the officers individually; and yet, in case of disobedience to the peremptory *mandamus*, there is no doubt that the officers, by whose delinquency it was incurred, would have been liable to atttachment for contempt. The proceedings may be commenced with one set of officers and terminated with another, the latter being bound by the judgment. Bd. Commissioners v. Knox Co., 24 How. 376; Supervisors v. United States, 4 Wall. 435; Von Hoffman v. Quincy, 4 Wall. 535; Benbow v. Iowa City, 7 Wall. 313; Butz v. City of Muscatine, 8 Wall. 575; Mayor v. Lord, 9 Wall. 409; Commissioners v. Sellew, 99 U. S. 626; and many others. And so, if we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the ex-

piration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the change of individuals in the office. The writ might be directed to the township clerk by his official designation, and will not be deprived of its efficacy by inserting his individual name. The remarks of Mr. Justice Cowen, in The People v. Collins, (19 Wend. 68) are very pertinent to the case, and seem to us sound. That was a *mandamus* to commissioners of highways who were elected annually; and it was objected that their term would expire before the proceedings could be brought to a conclusion. Justice Cowen said: "The obligation sought to be enforced devolves on no particular set of commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present commissioners and their successors; and the peremptory writ may be directed to and enforced upon the commissioners of the town generally. To say otherwise would be a sacrifice of substance to form." In this connection we may also refer to the recent case of Commissioners v. Sellew, 99 U. S. 626. The cases in which it has been held by this court, that an abatement takes place by the expiration of the term of office, have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government, whose officers they were. A proceeding against the government would not lie. Sec. v. McGarrahan, 9 Wall. 298; United States v. Boutwell, 17 Wall. 604. We think that the proceedings have not abated either by the resignation of the clerk and the appointment of a successor, or by the expiration of his term of office, even if it sufficiently appeared that either of these contingencies had occurred.

The judgment of the circuit court is affirmed.

ATTORNEY — COLLECTIONS — OFFSET TO ANTECEDENT IFDEBTEDNESS.

SIMPSON v. PINKERTON.

Supreme Court of Pennsylvania, March, 1881.

An attorney, when he has collected a claim, has no right to set-off the amount against an antecedent claim in his own right against his client.

Error to Court of Common Pleas No. 2, of Philadelphia County.

This was an action brought by Todd, Keichline and Cochran, for themselves and other parties named, to recover a sum of money, collected by J. Alexander Simpson, as their attorney, from the Commonwealth. The action was prosecuted by Mr. Pinkerton, the executor of Todd, the survivor of the legal plaintiffs.

In the pleadings, and at the trial, the whole of the plaintiffs' case was admitted, and the only question made was as to the defense in nature of a set-off proposed to be set up. Nevertheless, as the question of the admissibility of this set-off partly turns on the nature of the claim to which it is pleaded, it is important to show what the plaintiffs' case is. According to the admitted facts, Mr. Simpson (who is, as is well known, a member of the Philadelphia bar) was, by a written letter of attorney, constituted attorney for Todd, Keichline & Cochran, to collect from the State a certain claim for damages due for the occupation of certain land, held by said Todd & Co. as a drafted camp during the rebellion.

Certain Acts of Assembly were passed authorizing such payment, ending with the Act of April, 1869.

The audit, as provided for in said Act, was duly held, and subsequently, on December 1, 1869, said Simpson collected and received the sum of $3,028 from the State authorities under this power of attorney for the plaintiffs' account. He has never paid over any part of it. He claimed certain allowance, for disbursements and fees, which plaintiffs at trial were willing to concede.

The pleadings having admitted the plaintiffs' case, the defendant, under his plea of set-off, made the offers which were excluded by the court, as set forth in the bill of exceptions. His proposed defense was substantially that the plaintiffs had purchased a certain drove-yard property in 1859, and, as part of the purchase money, had agreed to pay the bonds and coupons secured by a certain mortgage subsisting thereon, held by certain trustees for the bondholders; also to prove by the testimony of James A. Freeman, auctioneer, that the premises were sold under foreclosure of said mortgage in 1863, and that the proceeds of sale were insufficient to pay the mortgage. He also offered in evidence a bond for $100, on which eighty-three dollars and twenty-one cents had been paid, being one of those secured by the mortgage, and also six hundred and eighty-seven detached coupons for interest running from October 1, 1859 to October 1, 1871, as certain bonds secured by said mortgage. The bond was admitted without objection, the coupons excluded.

And plaintiff admitted a set-off in favor of defendant for the balance due on said bond, and also for his claim for compensation and expense as their attorney. The statements contained in plaintiff in error's "history of the case," that plaintiff in error was, at the time of his employ-

ment as attorney, the holder of bonds and coupons secured by the mortgage; that this was well known to Keichline, one of the defendants in error; that plaintiff in error constantly asserted his right, and actually brought suit, and of an interview between the parties, and the response of Mr. Keichline, are outside the case. There was no testimony of anything of the sort, nor any offer to prove anything of the sort. At a former trial an offer to this effect was indeed made, and plaintiff in error took the deposition of one Gross on this subject, but his testimony entirely failed to prove the facts alleged.

Alex. Simpson, Jr., and *B. H. Brewster, Esqs.*, for plaintiff in error.

Geo. T. Bispham and *R. L. Ashhurst, Esqs.*, for defendant in error.

Opinion PER CURIAM:

We think it very clear that an attorney at law or in fact, when he has received or recovered the money, has no right to set-off an antecedent debt or claim in his own right against his constituent. He ought to show in such case that his constituent expressly agreed that he might retain his demand out of the money. This renders it unnecessary to examine the other questions raised on the record.

Judgment affirmed.

MUNICIPAL CORPORATION — REPEAL OF CHARTER—CREDITORS' RIGHTS.

O'CONNOR v. CITY OF MEMPHIS.

Supreme Court of Tennessee.

When the charter of a municipal corporation is repealed, and the same people and the same territory are reincorporated as a municipality under a new name, although with different powers and different officers, a suit pending against the old corporation at the date of the repeal may be revived against the new corporation.

COOPER, J., delivered the opinion of the court:

By the act of 1879, ch. 10, the legislature repealed certain charters of municipal corporations, and, among others, the charter of the city of Memphis. By an act passed on the same day, the several communities embraced in the territorial limits of the municipal corporations whose charters were thus abolished, were created taxing districts, "in order to provide the means of local government for the peace, safety and general welfare of such districts." The community embraced in the territorial limits of the city of Memphis became, by the act, the Taxing District of Shelby county, and organized under it. This court has held, as the result, that the charter of the city of Memphis has been validly repealed, and that the same people and the same territory has been constitutionally reincorporated as a municipality. Luehrman v. Taxing District of Shelby County, 2 Lea, 425.

At the time of the passage of these acts, the suit of O'Connor v. City of Mempais was pending on the docket of this court by appeal from the chancery court. At the succeeding term, on motion of the complainant, a *scire facias* was issued in the case, requiring the Taxing District of Shelby County to show cause why the suit should not be revived against it. The taxing district has demurred to the *scire facias*.

The *scire facias* in this State is a statutory mode of reviving suits in this court, as well as the inferior courts, against the heir, representative, assign or "other successor." of a deceased party. Code, sec. 2853, *et. seq.* It has not been denied that the *scire facias* would lie in this case, if the taxing district could be brought in for the purpose of being proceeded against as a proper defendant. The argument in support of the demurrer is rested upon the ground that the new corporation sustains no such relation to the old corporation, as to authorize any proceeding against it in any mode for a debt of the latter. It is also said, that if the corporations are the same, no revivor is necessary. But if this be conceded, the complainant would still have the right, by suggestion of record, or otherwise, to bring the facts before the court, so that the further proceedings might be in the right name. In this view, the *scire facias* may be treated as a notice, and, in the absence of any special objection to the form of the proceedings, as sufficient to raise the issue to be determined. East Tennessee, etc. R. Co. v. Evans, 6 Heisk, 607. The real question is whether the new corporation is the same as the old corporation, or so far its successor as to be liable for its debts.

It was the received doctrine at one time, that by the principles of the common law, upon the civil death of a corporation, its real estate reverted to the original grantor, or his heirs, the debts due to and from it were extinguished, and its personal property vested in the State. The law was so stated, *arguendo*, in some of our cases. White v. Campbell, 5 Humph. 38; Ingraham v. Terry, 11 Humph. 572; Hopkins v. Whitesides, 1 Head, 31. There is reason to doubt whether the decisions of the courts ever justified such a statement of the law. Bacon v. Robertson, 18 How. 480. And it is now well settled, both in England and in this country, that equity will, upon the dissolution of a corporation by the expiration of its charter or otherwise, impound its property, real and personal, and appropriate it, first to the payment of its debts, and then for the benefit of the stockholders. The law now is, independent of statute, that upon the civil death of a corporation, its real estate does not revert to its original owners, the debts due to and from it are not extinguished, and ist personal property does not vest in the State. This court, in accordance with all the modern rulings, has expressly so held. State v. Bank of Tennessee, 5 Baxt. 101.

Looking only to the fact that a corporation is created by its charter, it is logically correct to say that each corporation called into being by an independent charter is a distinct entity.

From this premise it has been ingeniously and ably argued that two successive corporations can not be connected together any more than two human beings, born successively, can be treated as one. But if the doctrine of metempsychosis be admitted, the identity of individuals would be possible by the transmigration of the essential part, and their succession in right and liabilities is recognized by law. And the legislature and the courts have settled the continuity of corporations by the transfer of their material parts; whether by identity or succession, is practically immaterial, although the old charter may be expressly repealed and an entirely new charter granted.

It has been loosely said that whether a legislative charter will operate to revive and continue an old, or to create a new and distinct corporation, depends upon the intention of the legislature.

More accurately, it has been said, we must look to the terms of the charter, and give them a construction consistent with the legislative intent and the intent of the corporators. Both forms of expression are an adaptation of the language of Judge Story in the case of a private corporation, where the corporate name of the new creation, and some of the corporators were the same as those of a then existing corporation, but the residue of the corporators and the corporate property were not the same. Bellows v. Hallowell Bank, 2 Mason, 43. But in no case have the courts ever failed to declare the identity or succession or continuity of the two corporations, where the same corporators and the same corporate property have passed to the new corporation. The "terms of the charter" have, in such cases, never been construed otherwise.

In reference to municipal corporations, the rule from the earliest times has been that a change of name or function would not affect obligations. Luttrell's Case, 4 Rep. 87 b; Haddock's Case, Raym. 439. Entirely new charters, upon a total cessation of user for years under an old charter, have been held to have no greater effect. Colchester v. Seaber, 3 Burr, 1866. "Many corporations," says Lord Mansfield in this last case, "for want of legal magistrates, have lost their activity and obtained new charters; and yet it has never been disputed but that the new charters revive and give activity to, the old corporation. Where the question has arisen upon any remarkable metamorphosis, it has always been determined that they remain the same as to debts and rights.

The statute books of this State are full of instances where new charters have been granted to municipal corporations upon an express or implied repeal of the old charter, with a change of name and organization, and the continuity of the corporations, "as to debts and rights," never doubted. A striking instance is found in the history of the municipal corporation now before us. In 1849, the people and territory of the "City of Memphis" and of the town of "South Memphis" were reincorporated under the name and style of the "Mayor and Aldermen" of the city of Memphis by an act which expressly repealed all laws to the contrary, the previous charters of the separate corporations being thereby repealed, as was held by this court. Daniel v. Mayor, etc. of Memphis, 11 Humph. 582. The conclusion of Mr. Justice Field on this subject is warranted by all the authorities: "When a new form has been given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intends a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities, as well as the rights of property of the corporation in its old form, should accompany the corporation in its reorganization. Broughton v. Pensacola, 93 U. S. 266. To the same effect in substance are Milner v. Pensacola, 2 Wood. 638; Trustees v. City of Erie, 31 Pa. St. 515; Shankland v. Phillips, 3 Tenn. Ch. 556; Olney v. Harvey, 50 Ill. 453; Girard v. Philadelphia, 7 Wall. 1. Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these things combined, will destroy the identity, continuity or succession of the corporation, if the people and territory reincorporated constituted an integral part of the corporation abolished. The reason is to be found in the peculiar nature of such corporations. A charter for municipal purposes is an investing of the people of a place with the local government thereof, constituting an *imperium in imperio*, and the corporators and the territory are the essential elements, all else being mere incidents or forms. Cuddon v. Eastwick, 1 Salk. 192; Luehrman v. Taxing District, 2 Lea, 425; People v. Morris, 13 Wend. 325; People v. Hurlburt, 24 Mich. 44, 88; New Orleans Railroad Co. v. City of New Orleans, 26 La. Ann. 476. And precisely as a change in the form of government, or even the conquest of a State, will not affect its rights or liabilities, whatever may be the incidental modifications, so neither will a change of a lesser empire. The property held by such a corporation for public use, can not be subjected to the claims of creditors, and is only held by it as trustee. The only means at its disposal for the payment of debt consist, ordinarily, of the taxes which it is authorized to raise from the persons, property and business within its territorial limits. The persons and property, or, as said above, the corporators and the territory are the essential constituents of

the corporation, and rights and liabilities naturally adhere to them.

The courts have accordingly held that creditors may follow these constituents even when divided out among other distinct municipalities, the original debtor corporation being abolished. As long as the old corporation continues to exist, although shorn of its proportions, the creditor may, and, according to some authorities, must, look exclusively to it. Howard v. Horner, 11 Hum. 532; Laramie County v. Albany County, 92 U. S. 307. A qualification of the latter part of the rule may be assumed, although the point seems never to have arisen in judgment, where the municipality has been so reduced in population and territory as to be unable to meet its liabilities. If, however, two new townships are created out of an old one, it has been held that a judgment creditor of the latter may revive his judgment by *scire facias* against each of the new townships, subject to only one satisfaction. Plunket Creek Township v. Crawford, 27 Pa. St. 107. So where one town was abolished by statute, and its population and territory unequally divided between two others, a creditor of the old town was held entitled, by bill, to charge each of the new towns with its proportion of the debt. Mount Pleasant v. Beckwith, 100 U. S. 514. "The effect of the annulment," says Mr. Justice Clifford in this case, "and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation." This court has reached the same conclusion in the case of a school district divided between other districts. Bank v. Baber, at Nashville, 1880; see, also, District of Columbia v. Clerk U. S., S. C., October term, 1880, 12 Cent. L. J. 381. In view of the plenary powers of the legislature over municipal or quasi-municipal corporations, and the necessity of its frequent exercise according to public exigency, the wisdom of these rulings is obvious.

It has been argued that the liabilities of a dissolved corporation only follow its territory and population into a new corporation in the absence of any legislation on the subject, and that the legislature may expressly provide otherwise. But there is no warrant for the argument, either in reason or authority. Some of the learned judges, in delivering the opinion of the court in particular cases, have taken care, as was right and proper in a question of so much importance, to limit the decision to the very case before them, and have said that the result reached would follow, "at any rate, in the absence of any declaration of legislative intent to the contrary." No intimation has been given that if there was such declaration, the decision would be different. Mr. Justice Field expresses the opinion in the Pensacola case, that the liabilities will accompany the corporation in its new form, "in the absence of express provision for their payment otherwise." So Mr. Justice Clifford's expression is that "the legislature may regulate the subject;" that is, as the context shows, may proportion the liabilities between the new corporation, as its wisdom may suggest. Neither of these eminent judges, nor has any judge intimated, much less decided, that the legislature could interfere with the rights of creditors, or the legal results of the legislation. On the contrary, every judge has, in view of the provision of the Constitution of the United States, unhesitatingly said that the legislature could not impair the obligation of the creditor's contract. If it was otherwise, the legislature might simply repeal the charter of a municipal corporation, and at once reincorporate the same people and territory under a similar corporation, and cut off all creditors by adding that the new corporation should not be liable for the debts of the old corporation. Such legislation would be obnoxious to the Constitution of the United States (art. 1, sec. 10) and the Constitution of the State, art. 1, sec. 20, and art. 11, sec. 8. Even the right acquired by a pending suit can not be affected by such legislation. Code, sec. 49; Fisher v. Dabbs, 6 Yerg. 119. And the legislature can not do indirectly, what it is not at liberty to do directly.

In the act repealing the charter of the city of Memphis, there is a provision transferring the public property of the city to the "custody and control of the State, to remain public property for the uses to which it had been previously applied."

By the act reincorporating the same community and the same Territory in the name of the taxing district, this property is again transferred to the custody and control of the governing board of the new corporation, to remain public property for the like uses. The city of Memphis seems to have owned no other property. Confining ourselves, for the present, to these provisions of the act, the substance of what was done was, that the people and territory of the repealed corporation were at once reincorporated into a municipal corporation, and given possession of all the property of the old corporation for the same public use.

The new corporation is identical with the old corporation in all its essential elements. A change in the form of the government would be unimportant. Unless, therefore, there is something else in the charter to take the case out of the rule, rights and liabilities would remain as before.

It is argued that pending suits for or against the old city are, under the provisions of the new charter, not to abate, but to be prosecuted to final determination without change of parties, citing act of 1879, ch. 11, sec. 14. This is, however, a mistake. That section, as the act was originally passed, did contain these words: "And all suits now pending shall be prosecuted to final determination, under the provisions of this act without change of parties." But the context shows that the suits thus provided for were suits in favor of the old corporation for indebtedness

due to it for taxes or otherwise, and this provision was repealed by the fifth section of the amendatory act passed at the same session of the legislature. There is no provision for the pending suits against the old corporation.

There was a large amount of uncollected taxes which had been assessed from time to time by the city of Memphis, either in the course of its regular business, or acting under the orders of the court. The legislature vested this indebtedness in the State "to be disposed of for the settlement of the debts of said extinct municipality as shall be hereafter provided by law."

By a subsequent act, passed at the same session, the legislature directed the governor to appoint a receiver and back-tax collector, to collect these taxes in the mode prescribed, and to appropriate them among those entitled, under the orders of the chancery court, by means of a general creditors' bill, filed by him in the name of the State, and on behalf of all the creditors, against all delinquent tax-payers, pending suits against such tax-papers being revived in the name of the State and consolidated therewith. The creditors are permitted to make themselves parties to the receiver's bill by filing their claims, and having the same ascertained in a summary way upon a contest by any of the other creditors or by the receiver.

So far as the legislation in question undertakes to appropriate the uncollected tax to the payment of the debts and liabilities of the old corporation, it is a regulation of the matter "as between the parties." To the extent of the payment which the creditors may receive under its provisions, the new corporation would have the benefit. But neither the old nor the new corporation is required to be a party to that suit, and, therefore, the claimant could recover no judgment against either. The legislature, as we have seen, could not violate the obligation of the claimant's contract, either by reducing the claim to the *pro rata* which might be received under the receiver's bill, or by compelling the creditor to go against any person except his debtor. Howard v. Horner, 11 Humph. 532. Nor could the legislature interfere with the creditor's pending suit. The legislature has not made provision for the payment of the entire debts, nor regulated the subject as between the parties.

The act incorporating the Taxing District expressly prohibits the governing agencies from levying taxes for any purpose, reserving that power in the legislature. It further provides that the local government shall not "pay or be liable to pay any debt created by said extinct corporation, nor shall any of the taxes collected under the act ever be used for the payment of any of said debts." The latter provision is itself a legislative recognition of the identity, continuity or succession of the two corporations, for otherwise it would have been useless. And the question comes to this, can the legislature, where the corporations are substantially the same, according to the terms of the charter as construed by the courts, change the legal effect of what has been done by positive mandate, that the new corporation shall not be liable for the debts of the old? If it can, it would logically follow that the legislature could prohibit a corporation from paying its own debt. It has no such power. Such a prohibition is simply void. And in this case, under the circumstances, the provision in question is amenable to the constitutional objection that it undertakes to impair the obligation of contracts. Whether the legislature can withhold the taxing power as against debts previously contracted, is a grave question not now before us. It may be that the creditor can not collect his debt, but, to use the language of Judge Clifford in the Beckwith Case, "he ought always to be able by some proper action to reduce his contract to judgment." The creditor should have this right in the present case, both for the purpose of reaching his share of the assets which may be realized by the receiver, and to have the benefit of future legislation. The courts can never presume the permanent repudiation by the State of an honest demand. This court has decided that the holder of a valid claim on the treasury of the State is entitled to compel the controller to issue him a warrant therefor, although it can not be paid without an appropriation for the purpose by the legislature, and no such appropriation has been made.

We express no opinion on any point not now before us. All we undertake at present to decide is, that the Taxing District of Shelby county is so far the successor of the late corporation of the City of Memphis, or the same corporation under a new name, that a suit, pending against the old corporation, may be revived against the new, and prosecuted to judgment.

REGISTRATION OF DEEDS — CONSOLIDATION OF RAILWAY CORPORATIONS — UNRECORDED MORTGAGE — JUDGMENT CREDITOR.

MISSISSIPPI VALLEY CO. v. CHICAGO, ETC. R. CO.

Supreme Court of Mississippi, May, 1881.

1. Where two railroad companies are consolidated, the new corporation is the successor of both the former corporations and all their franchises and property, and assumes all their debts and obligations, and is therefore bound by an unrecorded mortgage made by one of them, of which it had no notice.

2. But a judgment-creditor of such consolidated company, without actual notice, does not stand in the same position. As to him, although at common law a mere volunteer, taking only the rights of his debtor, the effect of the registry law is to postpone such mortgage to his rights.

CHALMERS, C. J., delivered the opinion of the court:

The Mississippi Central Railroad Company was originally the owner of the land sued for, and as such executed, on May 1st, 1872, a mortgage upon it as well as upon all its other property, real and personal, to secure the holders of its bonds. This mortgage was not recorded in the County of Copiah, in which this land is situated. In April, 1874, the Mississippi Central Railroad Company and the New Orleans, Jackson & Great Northern Railroad Company, in accordance with the provisions of an act of the legislature authorizing the step, consolidated and merged themselves into a new corporation, which assumed the name of the New Orleans St. Louis & Chicago Railroad Company (this corporation must not be confounded with the present defendant, known, by an inversion of the name, as the Chicago, St. Louis & New Orleans R. Co., and which is the later creation of a subsequent organization).

By the terms of the consolidation, the new corporation acquired all the property and franchises, and assumed all the debts and obligations, of the two corporations, of which it was formed, and which became extinct by its creation.

On November 17, 1875, the mercantile firm of Faler & Co. recovered a judgment against the consolidated company, in the Circuit Court of Copiah County; the same being based on a default of its duty as a common carrier, committed by the new company. This judgment was regularly enrolled, and a sale of the lands in question having taken place, under it, the same was bought by Faler & Co., the plaintiffs in execution, who subsequently conveyed to the plaintiffs in this suit.

Plaintiff's title, it will be seen, is thus derived through a judgment rendered against the consolidated corporation who had obtained the land from the Mississippi Central Railroad Company, the grantor in the unrecorded mortgage. This unrecorded mortgage, by proceedings in the United States District Court, instituted after the date of the recovery of the judgment of Faler & Co. in the Circuit Court of Copiah County, was ordered to be foreclosed, by decree rendered on March 6, 1876; and at the sale under this decree, defendants became the purchasers of this land, as well as of all the other property, rights and franchises, of the consolidated corporation. This sale took place more than a year after the sale under the Faler & Co. judgment. Defendants claim title, therefore, under the unrecorded mortgage; and, for the purposes of this case, may be considered as the assignees of that mortgage.

Some question is made, as to whether the consolidated corporation, through a judgment against whom plaintiffs claim title, had actual knowledge of the unrecorded mortgage, executed by the Mississippi Central Railway Company, from whom they obtained the land. We do not think that the consolidatied company, or those who trace title through it, can be heard to aver ignorance of any of the debts, contracts or incumbrances, of either of the companies, by a merger of which it was formed. It exists and was created by an absorption of those companies. The acquisition of their property and franchises gave it being; and the payment of their debts, and the fulfillment of their contracts, was the law of its being. It took the property burdened with the debts, and the payment of the debts constituted the consideration to be paid for the acquisition of the property. It held the property, therefore, charged with a trust in favor of all who had liens against it, which were valid against those from whom it was derived.

The unrecorded mortgage then bound the land in the hands of the consolidated corporation, and could have been enforced against it. Can it be defeated by a creditor of the consolidated company, or by a purchaser under a judgment against it, who had no notice of its existence?

If the consolidated corporation had been the maker of the unrecorded mortgage, any creditor of it who had reduced his demand to judgment, before record or actual notice of its existence, would prevail over those whose rights depended upon it. Such we understand to be the effect of our registry laws. The utterances of this court have not always been harmonious on the subject of the rights of judgment creditors, and purchasers at execution sales, as affected by the secret rights and equities of third persons.

Undoubtedly at common law, the execution purchaser was regarded as a mere volunteer, who acquired nothing more than the interest of the defendant in execution, and was liable to be defeated by any one who could show a legal or equitable right, superior to that of the defendant. Nor did it matter if that right was unknown to all the world, provided only, it was available against the defendant. If available against him, it was equally so against his creditors and assignees by operation of law. The judgment creditor still remains, to some extent, a volunteer; and it is still true that a purchaser at execution sale obtains only the interest of the defendant in execution, except where the registry laws otherwise provide. But those laws do provide that "every conveyance, covenant, agreement, deed, mortgage and trust deed" must be recorded in order to be valid and effectual against "subsequent purchasers and all creditors;" which is the same thing, of course, as saying that these conveyances shall, as to creditors, be absolutely void.

Whenever an instrument, which the registry laws require to be recorded, has been made by a grantor having beneficial interest in the property conveyed, which is vendible under execution, remains unrecorded, a judgment creditor who has no actual notice of it, nor anything to put him on inquiry, may subject the interest of the grantor, exactly as if he had made no such instrument; and the purchaser at the execution sale will obtain a title superior to the rights of those who claim by, through, or under the unrecorded instrument.

Where the grantor is without beneficial interest, though clothed with a naked legal title, or where the outstanding equity of a third person is such as arises by operation of law, and is incapable of being made a matter of record, as, for instance, where it is a resulting trust, or a vendor's lien, the registry laws have no application; and in such cases the judgment creditor remains, as at common law, a mere volunteer, because unprotected by any statute. The case of Kelley v. Mills, 41 Miss. 267, is an instance of the first class of cases, above alluded to, though in the opinion there delivered, the distinction here pointed out is not sufficiently dwelt upon. The turning point in the case, and the feature that makes the decision correct, was the fact that the attached debtor, Griffing, never had any actual interest in the property, but was a mere naked trustee for others. The case of Walton v. Hargroves, 42 Miss. 20, illustrates that class of cases where the equity asserted is one that needs not to be recorded, and ordinarily can not be. It was a case of a vendor's lien, the creature of a court of equity; and as no record of it was necessary, it was held that there was nothing to shelter the purchaser at execution sale from its operation. The case of Henderson v. Downing, 24 Miss. 106, illustrates the general class of cases, where the right attempted to be set up against the purchaser at an execution sale, grows out of an instrument which the law requires to be recorded in order to be effective against creditors, and which has not been recorded. It was correctly held that the execution purchaser obtained a good title; though the instrument was recorded before he bought; because the record did not precede the judgment, and it was the judgment which fixed the rights of the parties. To the same effect are Humphries v. Merrill, 52 Miss. 92; Loughridge v. Rowland, 52 Miss. 546.

Both in our State and in others, there had been much confusion of utterances on this subject, in consequence of a failure to bear always in mind the change wrought by the registry laws. Undoubtedly, the correct doctrine is that the judgment creditor will subject the property of his debtor, stripped of all demands and interest of others, which must be evidenced by written instruments, required by law to be recorded, but which have not been recorded, and of which he has had no notice before judgment, provided the property be such as is subject to the lien of the judgment. In all other cases the creditor remains, as at common law, a mere volunteer, taking only the actual interest of his debtor, and liable to be defeated by any thing that would divest the debtor himself of the property. Such is the doctrine announced, with more or less distinctness, in several of our own cases, and especially in the recent case of Duke v. Clark, (Ms.); and such is stated, in Rorer on Judicial Sales, secs. 707-8, to be the later and better doctrine elsewhere.

We have been speaking of the rights of the creditor as against those claiming under secret conveyances from his debtor. But the case in hand is not of that character. Neither the plaintiffs nor their grantors here are, or ever were, the creditors of the grantor in the unrecorded mortgage, but of the grantee under that instrument. The Mississippi Central Railway Company made the mortgage and afterwards, by consolidation, conveyed the land to the New Orleans St. Louis & Chicago Railway Company. It was this latter company that became the debtor of Faler & Co., and it was as their property that the land was sold. The question presented, therefore, is whether the creditors of a subsequent grantee are so protected by the Registry Act, that they can resist attacks of one holding under a secret conveyance, made by the grantor of their creditor before the property came into the ownership of the latter. Who are "the creditors" referred to in those acts? Are they the creditors only of him who makes the secret conveyance? or does the term embrace all who may through all time give credit to one who is clothed with the record title to the property?

It is insisted with very great earnestness and ability, that the object of the Registry Acts is to give record notice to all the world of the exact condition of the title to real estate, so that all men, whether they propose to become purchasers from or creditors of him who claims to be owner, can rely with perfect trust and confidence upon the public records.

It is further insisted that "all creditors" are placed by law upon the same footing as "subsequent purchasers;" and as the latter are protected where they buy in good faith from a grantee who has notice of the unrecorded instrument, so must the former be also. An exhaustive search of the authorities fails to bring to light any adjudicated case sanctioning this view. While it is true that there is great dearth of direct adjudication upon the point either way, it seems universally to have been assumed, and been quite frequently declared, both in this State and elsewhere, that the purchasers and creditors referred to are purchasers from, and creditors of, the grantor in the unrecorded instrument; and that it is such purchasers and creditors, only, who are protected. As to these, the purchasers must be "subsequent" ones, while "all creditors," whether subsequent or antecedent, are embraced, provided they have acquired liens before notice, actual or constructive of the secret conveyance. The point was expressly decided by the Supreme Court of the United States in Pierce v. Turner, 5 Cranch, 164: and though one judge dissented on the special facts of the case, even he admitted, as a general proposition, that creditors of the grantee in a second conveyance were not protected by the statute from the effects of a previous unrecorded instrument, made by his grantor, of which he had notice, though his creditors did not. This seems correct on principle. The terms debtor and creditor are correlative in character; and unless something

appears to indicate a contrary intention, we must understand the one as referring to the other. So, where the statute speaks of the secret conveyance of a grantor being invalid as to creditors, unless some other intention is in some way indicated, we must understand the term as referring alone to *his* creditors. All other creditors, therefore, that is to say creditors of all other persons, not being embraced in the statute, remain at common law.

To the suggestion that the object of the statute was to put "subsequent purchasers" and "all creditors" upon the same footing, and that as subsequent purchasers from a second grantee of the grantor in the second conveyance are protected, so must the creditor of such grantee be also—there are two conclusive answers.

If it be true that subsequent purchasers from persons other than the secret grantor are protected by the statute, it is because they may still be deemed purchasers from him where they have bought from his grantee; since in such case their title is derivative, and so flows through and from him, that they are mediately, though not immediately purchasers from him. Creditors, on the contrary, occupy no such relation to each other, or to the successive owners of the property. The claim of each is collateral to, disconnected with, and independent of, the other, without any chain to bind the creditors of one to the creditors of the other, though both may have looked for satisfaction to the same property, owned, in turn, by their respective debtors. In no possible way, therefore, can language, intended by the statute to be applied to the creditors of him of whose secret acts the law-giver is speaking, be extended upon any idea of priority to the creditors of a subsequent holder of the property.

But it is not true that the registry acts protect, or were intended to protect, those who buy from remote holders of the property. They are protected by the common law, and by their own good faith or that of their vendors. If their vendors have had no notice of the unrecorded deed, they will obtain a good title by reason of that fact, though they, themselves, knew of it. If their vendor knew of it, but they did not, the same result will follow, because of their own good faith. And these results would follow, not by reason of the registry acts, but because such was the law centuries before those statutes were enacted.

The registry acts operate, not for the protection of those who buy in good faith property which the owner has already sold to another, but for the protection of the first buyer who, by recording his deed, can give notice to all the world without taking possession. The creditor, on the contrary, whom the common law regards as a mere volunteer, is dependent wholly on the statute, and where its letter fails, is utterly without protection.

In the case at bar, if the plaintiff company had bought the land in controversy, from the consolidated corporation, for value, and without notice of the unrecorded mortgage executed by the previous owner, the title would have been perfect, though its vendor had knowledge of that mortgage. That its good faith will not alike protect, where it derives title through an execution sale, is due to the fact that no statute so declares, and that from the time whereof the memory of man runneth not to the contrary, the law has been otherwise.

A deed or mortgage, taken in good faith from one who knowingly holds property encumbered by a secret lien, will always defeat the lien; a judgment confessed or recovered will not, except where the lien is by the registry laws required to be recorded and has been made by the judgment debtor. If the distinction seems without intrinsic merit, it must be abolished by other departments of the government than the judiciary; and until it has been done, we can only say that time out of mind such has been the common law of England, and that as to it we must regard our law-givers as saying with the barons at Runnymede, "*Nolumus leges Angliæ mutari.*"

Judgment affirmed.

NEGOTIABLE PAPER — CONSIDERATION — INNOCENT HOLDER.

CANNON v. CANFIELD.

Supreme Court of Nebraska, July, 1881.

Where a negotiable promissory note is assigned before maturity, the fact that the price paid was only about one-half of the face value, there being evidence to show that the payee did not consider the maker good, is not sufficient to put the purchaser on inquiry as to the consideration.

Appeal from Johnson County.

Metcalfe and *Davison & Easterday*, for plaintiff; *T. Appleget & Son*, for defendant.

MAXWELL, C. J., delivered the opinion of the court:

This is an action to enjoin the defendant from transferring a certain promissory note executed by the plaintiff, and to have the same delivered up and cancelled. A decree was rendered in favor of the plaintiff in the court below. The defendant appeals to this court. A copy of the note is as follows:

"$100. Tecumseh, Johnson Co., Nov. 6, 1879.

"One year after date I promise to pay the treasurer of the Nebraska Iron Fence Company, of Nebraska City, Nebraska, or bearer, the sum of $100, at State Bank of Nebraska, Seward, Nebraska, value received, with interest at ten per cent. per annum from date. Reasonable attorney fee, if suit be instituted on this note. P. O.

"ISRAEL CANNON."

The maker of this note lives on No. ——, section 31, township 6, range 12. "Name by agent,

I. Cannon. Residence, nine miles from Tecumseh, northeast."

The note was given for a share in stock, of which the following is a copy:

"No. 328. Authorized capital, $100,000. Shares $100. Each full paid up stock $100.

"State of Nebraska, Otoe County. This is to certify that I. Cannon is entitled to one share, of $100 each, of the capital stock of the Nebraska Iron Fence Company, incorporated under the laws of the State of Nebraska, and transferable only on the books of the company, on surrender of this certificate properly indorsed. Persons purchasing stock in this company please notify the secretary at once.

W. P. PERSHING, Secretary.

"Nebraska City, Nebraska, Nov. 6, 1879."

On the back of the certificate is as follows: "This certificate of stock entitles the holder thereof to all the iron fence at wholesale price that he may need for his own use, and that is manufactured and kept for sale by the company, and to receive 11 dividends that may be declared in posts or iron, at wholesale prices of same, when posts and iron are ordered together, for the first year, or until the company shall find that cash dividends may be declared. Nebraska Iron Fence Company." On a blank appointment of the plaintiff as agent of the Nebraska Iron Fence Company is the following: "Tecumseh, November 6, 1879. It is hereby agreed between the Nebraska Iron Fence Company and I. Cannon, that if, after reasonable time, said I. Cannon does not sell enough certificates and iron fence to the amount of $100 after using due diligence, then the Nebraska Iron Fence Company, upon the receipt of I. Cannon's papers, will return his. C. N. Rand, Gen. Agt." The note in question was made and delivered to Rand, and by him on the same day sold and delivered to the defendant, who claims to be a *bona fide* purchaser without notice. There is testimony tending to show that no such corporation as the Nebraska Iron Fence Company ever existed at Nebraska City; that the stock is worthless, and that the plaintiff has received no consideration for the note. But these facts do not seem to have been known even by the plaintiff himself at the time the defendant purchased the note. The plaintiff testifies on rebuttal as follows: "How soon did you have a conversation with the defendant after you signed the note? A. Well, sir, I can not exactly tell the date. Q. About how long?, A. It did not seem to me it was but a very few days; I don't think it could have been over a week. Q. Is it your judgment it was less than a week? A. It did not seem to me to be over four days, because I had iron fence on the brain about that time." This conversation took place after the defendant had purchased the note, and, even if the defendant had then been notified of the want of consideration, would not have been available against a *bona fide* purchaser. But the testimony tends to show that at the time the plaintiff regarded the consideration as entirely satisfactory. It is claimed the price paid by the defendant for the note in question, being much below the face value thereof, was sufficient to put him on inquiry as to the consideration. The amount paid for a promissory note may become a material inquiry in determining whether a purchaser obtained the same in good faith or not: as, should a collectible promissory note for $100 be offered for $25 or $50, or any sum entirely disproportionate to its value, it is a circumstance, and, in certain cases, may be sufficient to arouse suspicion and put the purchaser on inquiry. The testimony shows that the price paid by the defendant for the note in controversy was about the sum of $50. This, of itself, might be ground of suspicion. But the defendant testified that he did not regard the note as good (collectible), and for that reason he did not want to purchase it, and there is no testimony tending to show that the plaintiff was able to pay his debts. For aught that appears the defendant may have paid more for the note than he collected thereon. It is evident that the plaintiff was induced to give the note in question through false representations made by Rand, who claimed to be the agent of the Nebraska Iron Fence Company, and there seems to be good cause to indict Rand under the statute against obtaining property by false pretenses. But the testimony shows that the defendant purchased the note in controversy before maturity, for a fair value, and without notice of any defense to the same.

The injunction is therefore dissolved, and the cause remanded. Judgment accordingly.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MISSOURI.

June, 1881.

SUIT ON ADMINISTRATOR'S BOND—JURISDICTION—LIABILITY OF ADMINISTRATOR.—This suit was originally instituted by relators in the probate court of Carroll county, to recover an allowance in favor of relators against the estate of Stephen Stafford, deceased. The suit was against M. and E. W. M. Stafford, administrators, and Quillen and Austin, their securities. The petition states in substance that Stephen Stafford gave a negotiable promissory note to relators; that respondents, as administrators, collected a large amount of money belonging to the estate of Stephen Stafford, deceased; that relators had said note allowed against the estate, and it was placed in the fifth class, and it was ordered by the court that fifty per cent. should be paid on all such claims not secured by deed of trust, and all priority claims in full; that said administrators wholly failed and refused to pay said per cent., and judgment is asked on the official bond for the amount. A demurrer was sustained in the probate court on the ground of want of jurisdiction of person, of

subject matter, and because the petition did not state facts sufficient to constitute a cause of action. An appeal was taken to the circuit court, where judgment was given for respondents and the suit dismissed, when an appeal was taken to this court. *Held*, that the probate court had jurisdiction of the cause by the terms of the act establishing that court. Sections 1, 2 and 3 of art. 4, acts 1859 and 1860, p. 45. But until an order is made by the probate court for an administrator to pay a demand, or a certain portion thereof, no action lies against the administrator. State v. Modrell, 15 Mo. 421. No such order was made in this case, as the order was to pay fifty per cent. on all unsecured claims of the fifth class, and relators' was not of that description. Affirmed. Opinion by SHERWOOD, C. J.—*State ex rel. Shinn v. Stafford.*

EJECTMENT — DEED — RECITALS IN DEED AS EVIDENCE—DECLARATIONS OF AGENT—WRITING AS EVIDENCE.—This is an action of ejectment, the County of Pettis, plaintiff, suing to recover possession of the land in controversy. It seems from an agreed statement that the county owned the land prior to April, 1871, and defendant claimed under a deed of that date, executed by the president of the county court to one Glasscock. Defendant introduced, as evidence of his title, an order of the county court at its April term, 1871, said order providing that E. W. Washburn, presiding justice of the county court, should convey all right and title of the county to all swamp lands that had been purchased by individuals, on their making affidavit that the land had been paid for. He then offered a deed from the said Washburn to Glasscock to the land, the deed reciting the order of the county court, and the affidavit of Glasscock that the lands were swamp lands, and that he had paid for the same. Plaintiff objected on the ground that the order did not authorize Washburn to make the deed, and because the county could only convey by a commissioner, which was not done; and because said deed did not show a compliance with the order. The court sustained the objection, and instructed the jury to find for plaintiff, which they did. Defendant appealed. *Held*, that the agency of Washburn only extended to swamp lands; it was so expressed in the order, and it devolved upon defendant to show that the land in dispute was swamp land. The recitals in the deed are not competent evidence that the land had been purchased or paid for by Glasscock, or that it was swamp land. The declarations of one assuming to act as agent for another are not competent to establish the agency, or that business he is transacting is within the scope of his agency, when the agency is limited and the transaction itself does not show it to be within that scope. The court did right in sustaining the objection to the deed as evidence in the absence of any offer to supplement it with evidence to show that the land was swamp land, and it would make no difference that no specific objection was urg[illegible]t the time, as the legal effect of a writing in evidence may be determined at any time. Affirmed. Opinion by HENRY, J.—*Pettis County v. Gibson.*

GUARDIAN AND CURATOR—BOND—LIABILITY OF BONDSMEN—OBJECT OF STATUTE—SETTLEMENT.—The statute provides that the circuit court may, on the application of the guardian or curator, and after proof showing that it will be for the benefit of the ward, order the real estate of such ward to be sold or leased, and the proceeds put on interest, or invested in productive stocks, or in other real estate, first requiring such guardian or curator to enter into good and sufficient bonds to make such leases and conduct such sales with fidelity to the interests of his ward, and faithfully to account for the proceeds of such sales and leases according to law and as the order of the court may require. Wag. Stat. p. 677. secs. 34, 35. *Held*, that an administrator or guardian has not faithfully accounted for money received by him as such, within the meaning of the statute or bond, requiring him faithfully to account therefor, when he simply charges himself therewith before the proper officer, and at the time has the same in his possession. In order to faithfully account for such money, he must not only charge himself with it, but he must safely keep and disburse the same according to law. The object of the statute was to provide additional security for the safe keeping and proper disbursement of such personal property as comes to the hands of the curator through the action of the circuit court, as well as for the fidelity of the curator in the execution of the orders of such court. The surety on the bond under this statute would be liable only for conduct of she curator and for the the faithful disbursement of the funds received by him under the orders of the circuit court, and not for the funds received under the general law governing curators solely under the orders of the probate court. The funds received through the orders of the circuit court should be carried by the curator into his settlements with the probate court, and when necessary, that court should require a separate account of such funds and of the disbursement thereof to be rendered by the curator for the purpose of making the bond given under the orders of the circuit court an effective security. Reversed and remanded. Opinion by HOUGH, J.— *State of Missouri v. Coleman.*

APPEAL FROM COUNTY COURT—PETITION—PRIVATE PROPERTY FOR PRIVATE USE—PROCEEDINGS IN INVITUM.—The same provisions govern in an appeal from the county court to the circuit court, as in appeals from justices of the peace, and the circuit court must proceed to hear and determine the cause anew. Where no notice of the appeal was given respondent, and he did not enter his appearance on or before the second day of the term, it was not competent for him either to bring the cause to trial at that term or to continue it to a subsequent term, and certainly not to

have the cause dismissed for any lack of jurisdiction in the circuit court to take cognizance of the appeal. Sec. 20 of art. 2 of the Constitution of 1875 provides that no private property shall be taken for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity and in a manner prescribed by law. This petition for the opening of private road does not show either directly or by by implication that the road sought to be opened is a "way of necessity," and it is fatally defective. Proceedings *in invitum*, against common law and common right, have always been strictly construed by this court. Ellis v. Pacific R. R., 51 Mo. 200, and cases cited; Jefferson County v. Cowan, 54 Mo. 234; Railroad v. Campbell, 64 Mo. 585. Reversed and petition dismissed. Opinion by SHERWOOD, C. J.—*Cobville v. Judy.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

20. Would a paper, signed by no one, acknowledged by no one, constitute "articles of incorporation," as used in the Code of Iowa (1873), sec. 1060, prior to the amendment of said section by 17th General Assembly? I can not find anywhere a definition of the term "Articles of Incorporation." M.
Webster City, Iowa.

21. Is a sleeping-car company liable for a robbery which takes place on one of its cars, where it was negligent in failing to keep watchman, etc.? Please cite authorities. H. H. W.

22. R, an attorney, on being elected judge, made an arrangement with S to succeed him in his unfinished professional business, by which it was agreed that S would represent him in all his cases, and for his services should be entitled to and receive all the fees in them, regardless of the past services of R; and in pursuance of the agreement S represented R in one of the cases in which there had been no agreement with the client as to the amount of the fee he was to pay, and prosecuted it to final judgment. The questions are: 1. Whether the client was bound by the agreement between the attorneys, unless he was a party or privy to it, or afterwards assented to it? and 2. Whether S could maintain an action against the client for both his and R's services, unless under a special agreement between the attorney and client, or as assignee of R's claim for his services. W.
Fort Smith, Ark.

23. M, a wool buyer, purchased a bale of wool from N, a commission merchant. Other bales were bought at same time of N. The latter gave demand orders on warehouse for delivery to M of lot, including a separate order for bale in question. According to usage these orders represented the wool, and were sometimes delivered before invoice from merchant and payment from buyer, and all bales had to be reweighed by buyer, and settlement and payment made according to reweights. When invoice was made out this bale, not having been reweighed, was left out, but delivery order was not withdrawn or canceled. It was afterwards reweighed, invoiced and paid for, and second delivery order, similar to the first, was given and not marked duplicate, neither party perhaps recollecting first order. M indorsed and hypothecated first order and borrowed money on it of O. M fails to pay O, and latter demands wool on first order of warehouse; the latter (without any notice) had properly delivered wool on second order. Has O, the pledgee, a remedy in trover, or case against N? Cite cases. G. B.
Selma, Ala.

24. In the dower law, where the statute provides "that a widow shall be entitled, at the death of her husband without issue, to one-half of his personal estate, including cash on hand, bonds, bills, notes, book accounts, and evidences of debt, whereof the husband died seized or possessed, absolutely and in her own right; and when she may also elect to take possession of this at the death of her husband, or allow the husband's administrator to sell the whole and take one-half the cash, and when the widow does elect that the estate be reduced to cash, and when done she to take the one-half of it, and before the said estate is so converted into cash for division, the widow dies, now, there is no issue of the marriage, and this is in reference to the personal estate. The question is: Under this statutory provision, does the one-half of the proceeds of said estate under such election vest in and become the absolute property of the widow, so as to be taken by inheritance by her heirs, or does it go back to and vest in the husband's estate to be taken by his heirs? If it does not become the absolute estate of the widow, and thereby subject to being inherited by her heirs, without being reduced to actual possession under this statute, why not?
Yellville, Ark. W.

RECENT LEGAL LITERATURE.

COPP'S UNITED STATES MINERAL LANDS. United States Mineral Lands; Laws Governing their Occupancy and Disposal; Decisions of Federal and State Courts in Cases Arising thereunder; and Regulations and Rulings of the Land Department in Connection therewith; with Forms, Glossary and Rules of Practice. By Henry N. Copp, Washington, D. C., 1881: Published by the Editor.

This work, which is a mine-owner's handbook rather than a law-book, is upon a topic of but little interest to the great majority of our readers, and a brief sketch of its contents will, therefore, suffice for our purposes. Part I consists of a compilation of mining laws of the United States. Parts II and III (which form a large half of the volume) are composed of "Land Office Regulations" and "Land Office Rulings" respectively. Part IV is made up of "Judicial Decisions." A few leading cases, which seem to be well selected (as far as our lack of familiarity with the subject will enable us to judge) for the illustration of

general principles are printed in full. The others are presented in the shape of an alphabetically arranged digest. Part V, "Miscellaneous" embodies forms, a glossary and some rules of practice, all of which must be of inestimable value to the neophyte in such practice.

AMERICAN REPORTS. The American Reports, Containing all Decisions of General Interest Decided in the Courts of Last Resort of the Several States, with Notes and References by Irving Browne. Volumes 32, 33, 34 and 35. Albany, 1880: John D. Parsons, Jr.

This series of reports of selected cases of authority from the current State reports, is too well known and has been too frequently mentioned by us to require elaborate discussion of the plan or the execution of the work. Both are excellent. These four volumes include all the cases of general authority from seventy-six volumes of contemporary reports. The notes are numerous and judicious, and abound in apposite citations.

NOTES.

——The abolition of capital punishment has received its recurring discussion in Parliament, in England, and the proposition has been rejected by a majority numbering more than double the advocates of the measure—175 to 79. The reasons *pro* and *con* were rehearsed comprehensively, and Sir William Harcourt, speaking for the Government, admitted the defects of the existing law in regard to the first and second degrees of murder, and inferred that the fact that murder was committed again and again proved that capital punishment was not a deterrent. He pointed out, however, that the idea of retribution does enter largely in the place of punishment; and though every one must be anxious to dispense with this punishment whenever consistent with safety, it would be unwise for the house to assent to such a proposition until it was certain that it was acting in accordance with a settled conviction of the country, which certainly was not the case at present. It is impossible to frame a system of punishment at once just and practicable, without taking into careful consideration the public opinion to which Secretary Harcourt here so well refers. Public opinion, on many occasions, may be little more than a passing effervescence of the hour; but in respect to crime and its punishment public opinion is another name for the conscience of the community, and that conscience must largely be expressed in the Criminal Code, if that Code is to be both practicable, efficient and just. In a community where violence abounds and private vengence needs to be restrained, law, if it is to be respected and effecacious, must be more severe than in those communities where the prevailing spirit is more mild. And the reason why the question of the abolition of capital punishment is incessantly raised, and makes such slow progress, is in the imperfectly developed condition of that mixed and contradictory mass of personal opinions from which what we call public opinion and the expression of general conscience is to be inferred.—*The Daily Register.*

——An extraordinary manifestation of hypnotism, presenting certain features identical with those lately illustrated in New York by Dr. Beard and Dr. Hammond, recently occurred in Paris. Last August a young man named Didier was sentenced to three months' imprisonment for an offense committed in the Champs Elysees. His counsel insisted that he should be submitted to medical examination, and the court decreed that he should be placed in the St. Antoine hospital for three months, under the surveillance of Drs, Mottet and Mesner, two well-known specialists in mental diseases. After three months they reported that Didier lived in a state of constant sonambulism, the attacks of which could be provoked at will; that he was entirely destitute of any will of his own, and submitted to all injunctions in the most automatic manner. On two occasions he divined the thoughts of the doctors. A student said to him in the night time, "Look, Didier, there's a pretty woman." It was pitch dark, and, of course, there was no woman present. Didier replied, "No, no; she is ugly; she has a child in her arms." This remark corresponded exactly to the thoughts of the student. Didier then rushed forward to save from falling the child which he imagined he saw in the arms of the imaginary woman. The case recently came up for decision in the court of appeals, when an extraordinary and painful scene was witnessed. The bench consented that the doctors should make certain experiments with the prisoner, who was thereupen mesmerized. Under the influence of the magnetic sleep, he was made to undress himself in the court room, to dress himself again, and to reproduce from memory a letter which had been sent to him while in prison. While he was writing it, Doctor Mottet took a long needle out of his instrument case, and plunged it into the young man's neck, but he felt nothing. By this time, however, the bench had seen enough of these painful experiments, and some of the audience crying out, *Assez! assez!* the sitting came to an end. The court, considering the prisoner was not responsible for his acts, quashed the verdict of the lower court, and the man was discharged.—*New York Tribune.*